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10/586,519	04/09/2007	Deolo Falcone	82062-0231	4582

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EXAMINER	
ROLAND, DANIEL F	

ART UNIT	PAPER NUMBER
3764	

NOTIFICATION DATE	DELIVERY MODE
12/24/2008	ELECTRONIC

Please find below and/or attached an Office communication concerning this application or proceeding.

The time period for reply, if any, is set in the attached communication.

Notice of the Office communication was sent electronically on above-indicated "Notification Date" to the following e-mail address(es):

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Office Action Summary	Application No.	Applicant(s)	
	10/586,519	FALCONE, DEOLO	
	Examiner	Art Unit	
	DANIEL F. ROLAND	3764	

-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE *3* MONTH(S) OR THIRTY (30) DAYS, WHICHEVER IS LONGER, FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136(a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133). Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1)☒ Responsive to communication(s) filed on *14 November 2008*.

2a)☒ This action is **FINAL**. 2b)☐ This action is non-final.

3)☐ Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11, 453 O.G. 213.

Disposition of Claims

4)☒ Claim(s) *2-7,10-13,18,20 and 22-28* is/are pending in the application.

4a) Of the above claim(s) *26-28* is/are withdrawn from consideration.

5)☐ Claim(s) _____ is/are allowed.

6)☒ Claim(s) *2-7, 10-13, 18, 20, 22-25* is/are rejected.

7)☐ Claim(s) _____ is/are objected to.

8)☐ Claim(s) _____ are subject to restriction and/or election requirement.

Application Papers

9)☐ The specification is objected to by the Examiner.

10)☐ The drawing(s) filed on _____ is/are: a)☐ accepted or b)☐ objected to by the Examiner.

Applicant may not request that any objection to the drawing(s) be held in abeyance. See 37 CFR 1.85(a).

Replacement drawing sheet(s) including the correction is required if the drawing(s) is objected to. See 37 CFR 1.121(d).

11)☐ The oath or declaration is objected to by the Examiner. Note the attached Office Action or form PTO-152.

Priority under 35 U.S.C. § 119

12)☒ Acknowledgment is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d) or (f).

a)☒ All b)☐ Some * c)☐ None of:

1.☐ Certified copies of the priority documents have been received.

2.☐ Certified copies of the priority documents have been received in Application No. _____.

3.☒ Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

* See the attached detailed Office action for a list of the certified copies not received.

Attachment(s)

1) ☐ Notice of References Cited (PTO-892)
2) ☐ Notice of Draftsperson's Patent Drawing Review (PTO-948)
3) ☐ Information Disclosure Statement(s) (PTO/SB/08) Paper No(s)/Mail Date _____.
4) ☐ Interview Summary (PTO-413) Paper No(s)/Mail Date. _____ .
5) ☐ Notice of Informal Patent Application
6) ☐ Other: _____.

DETAILED ACTION

The amendment filed 11/14/2008 has been entered. The previous drawing objections and 35 USC 112 second paragraph rejections have been withdrawn. Claims 2-7, 10-13, 18, 20, and 22-28 are currently pending and have been considered below.

Election/Restrictions

1. Restriction is required under 35 U.S.C. 121 and 372.

This application contains the following inventions or groups of inventions which are not so linked as to form a single general inventive concept under PCT Rule 13.1.

In accordance with 37 CFR 1.499, applicant is required, in reply to this action, to elect a single invention to which the claims must be restricted.

Group I, claim(s) 2-8, 10-13, 18, 20, and 22-25, drawn to an apparatus.

Group II, claim(s) 26-28, drawn to a method.

2. The inventions listed as Groups I and II do not relate to a single general inventive concept under PCT Rule 13.1 because, under PCT Rule 13.2, they lack the same or corresponding special technical features for the following reasons: There is no common technical feature linking Groups I and II because the method claim does not recite any structural limitations that link it to the apparatus claims, e.g., the step of informing the user that he or she is now warmed-up could be performed by someone standing by the device while the user warms up.

3. The examiner has required restriction between product and process claims. Where applicant elects claims directed to the product, and the product claims are subsequently found

allowable, withdrawn process claims that depend from or otherwise require all the limitations of the allowable product claim will be considered for rejoinder. All claims directed to a nonelected process invention must require all the limitations of an allowable product claim for that process invention to be rejoined.

In the event of rejoinder, the requirement for restriction between the product claims and the rejoined process claims will be withdrawn, and the rejoined process claims will be fully examined for patentability in accordance with 37 CFR 1.104. Thus, to be allowable, the rejoined claims must meet all criteria for patentability including the requirements of 35 U.S.C. 101, 102, 103 and 112. Until all claims to the elected product are found allowable, an otherwise proper restriction requirement between product claims and process claims may be maintained. Withdrawn process claims that are not commensurate in scope with an allowable product claim will not be rejoined. See MPEP § 821.04(b). Additionally, in order to retain the right to rejoinder in accordance with the above policy, applicant is advised that the process claims should be amended during prosecution to require the limitations of the product claims. **Failure to do so may result in a loss of the right to rejoinder**. Further, note that the prohibition against double patenting rejections of 35 U.S.C. 121 does not apply where the restriction requirement is withdrawn by the examiner before the patent issues. See MPEP § 804.01.

4. Newly submitted claims 26-28 directed to an invention that is independent or distinct from the invention originally claimed for the following reasons: The product could be used in a materially different process, such as one in which the user is not informed of the temperature change after warming up. Since Applicant has received an action on the merits for the originally

presented invention, the invention of Group I has been constructively elected by original presentation for prosecution on the merits. Accordingly, claims 26-28 are withdrawn from consideration as being directed to a non-elected invention. See 37 CFR 1.142(b) and MPEP § 821.03.

Claim Rejections - 35 USC § 102

5. The following is a quotation of the appropriate paragraphs of 35 U.S.C. 102 that form the basis for the rejections under this section made in this Office action:

> A person shall be entitled to a patent unless –
>
> (b) the invention was patented or described in a printed publication in this or a foreign country or in public use or on sale in this country, more than one year prior to the date of application for patent in the United States.

6. Claims 1-2, 7, 11-13, 18, 20, and 22-25 are rejected under 35 U.S.C. 102(b) as being anticipated by Barney (US Patent 4,312,358).

Barney discloses an exercise product (Fig 1, #11) comprising:

Regarding claims 23 and 25, a temperature sensor (22) to detect a body temperature of an individual; means of monitoring (26); a temperature processing means (27); and informing means (31) for informing the individual that their body temperature has increase approximately 1.7 deg C by emitting a signal.

Regarding claim 2, the product of claim 23, wherein said monitoring means include electronic processing means to process said temperature readings (Col 5).

Regarding claim 7, the product of claim 23, further comprising an output interface to display said temperature readings (15a).

Regarding claim 11, the product of claim 23, further comprising control means to control the beginning and the end of a cycle of said measurements (18, 19, and 20).

Regarding claim 12, the product of claim 23, wherein said sensor is able to read said temperature measurements by placing a body part of said individual near or on said sensor (Col 4).

Regarding claim 13, the product of claim 12, wherein said sensor is able to read said temperature measurements by placing a finger of said individual near or on said senor (Col 4). Examiner notes that a user is capable of placing a finger on the temperature sensor if desired.

Regarding claim 18, the product of claim 23, wherein said product is in the form of a control console for training equipment (Fig 1). Examiner notes that the product can control itself and it can be used for training equipment, and thus, the broadly recited limitation of being "in the form of a control console for training equipment" is met.

Regarding claim 20, the product of claim 23, further comprising independent power supply means (Col 5).

Regarding claim 22, the product of claim 23, wherein said equipment comprises at least one handle, or handgrip (Fig 1), provided with a projection (Fig 1, #14) and wherein said sensor (Fig 1, #13) is placed near said projection.

Regarding claim 24, the product of claim 23, wherein said temperature is measured continuously (Col 2, lines 49-53).

Examiner notes that measuring the effectiveness and efficiency of warming-up and winding-down physical exercises performed by an individual in claim 23 is an intended use recitation and the product disclosed by Ward is capable of performing such functions.

7. Claims 6, 10-13, 18, 20, 22-23, and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Ward (US Patent 4,509,531).

Ward discloses an exercise product (Fig 1, #10) comprising:

Regarding claims 23 and 25, a temperature sensor (Fig 3, #36) to detect a body temperature of an individual; means of monitoring (Abstract); a temperature processing means (Col 7, lines 1-9 and Col 19, lines 26-36); and informing means (44) for informing the individual that their body temperature has increase approximately 1.7 deg C by emitting a signal.

Regarding claim 6, the product of claim 23, further comprising protection means to prevent contamination of said temperature sensor by external agents (Fig 3, #30 and Col 4, lines 31-33).

Regarding claim 10, the product of claim 23, wherein said temperature is measured at intervals (Abstract).

Regarding claim 11, the product of claim 23, further comprising control means to control the beginning and the end of a cycle of said measurements (Fig 1, #s 18, 20 and Col 4, lines 13-25).

Regarding claim 12, the product of claim 23, wherein said sensor is able to read said temperature measurements by placing a body part of said individual near or on said sensor (Col 4, lines 42-45).

Regarding claim 13, the product of claim 12, wherein said sensor is able to read said temperature measurements by placing a finger of said individual near or on said senor (Col 4, lines 42-45). Examiner notes that a user is capable of placing a finger on the temperature sensor if desired.

Regarding claim 18, the product of claim 23, wherein said product is in the form of a control console for training equipment (Fig 1). Examiner notes that the product can control itself and it can be used for training equipment, and thus, the broadly recited limitation of being "in the form of a control console for training equipment" is met.

Regarding claim 20, the product of claim 23, further comprising independent power supply means (Col 4, lines 49-66).

Regarding claim 22, the product of claim 23, wherein said equipment comprises at least one handle, or handgrip (Fig 3, #14), provided with a projection (Fig 3, #12) and wherein said sensor (Fig 3, #36) is placed near said projection.

Examiner notes that measuring the effectiveness and efficiency of warming-up and winding-down physical exercises performed by an individual in claim 1 is an intended use recitation and the product disclosed by Ward is capable of performing such functions.

8. Claims 10, 23, and 25 are rejected under 35 U.S.C. 102(b) as being anticipated by Barney (US Patent 4,450,843).

Barney discloses an exercise product (Fig 1, #11) comprising:

Regarding claims 23 and 25, a temperature sensor (21) to detect a body temperature of an individual; means of monitoring (38); a temperature processing means (26); and informing means (15) for informing the individual that their body temperature has increase approximately 1.7 deg C by emitting a signal.

Regarding claim 10, the product of claim 23, wherein said temperature is measured at intervals (Col 1, lines 61-68 and Col 2, lines 1-7).

Claim Rejections - 35 USC § 103

9. The following is a quotation of 35 U.S.C. 103(a) which forms the basis for all obviousness rejections set forth in this Office action:

> (a) A patent may not be obtained though the invention is not identically disclosed or described as set forth in section 102 of this title, if the differences between the subject matter sought to be patented and the prior art are such that the subject matter as a whole would have been obvious at the time the invention was made to a person having ordinary skill in the art to which said subject matter pertains. Patentability shall not be negatived by the manner in which the invention was made.

10. The factual inquiries set forth in *Graham* **v.** *John Deere Co.*, 383 U.S. 1, 148 USPQ 459 (1966), that are applied for establishing a background for determining obviousness under 35 U.S.C. 103(a) are summarized as follows:

1. Determining the scope and contents of the prior art.
2. Ascertaining the differences between the prior art and the claims at issue.
3. Resolving the level of ordinary skill in the pertinent art.
4. Considering objective evidence present in the application indicating obviousness or nonobviousness.

11. Claims 3-5 are rejected under 35 U.S.C. 103(a) as being unpatentable over Barney (US Patent 4,312,358) in view of Gentempo et al (US Pre-Grant Publication 2002/0151817).

Barney discloses all of the limitations of claim 1, but fails to explicitly disclose wherein said temperature sensor includes a thermocouple (claim 3), or said temperature sensor is of the no-contact type (claim 4) and wherein said no-contact type sensor is an infrared sensor (claim 5).

However, Gentempo et al teaches a temperature measuring device that comprises a no-contact type sensor that is an infrared sensor or a thermocouple (Paragraph 41).

Barney and Gentempo et al are analogous art because they are from the same field of endeavor – measuring devices.

At the time of the invention, it would have been obvious to one of ordinary skill in the art, having the teachings of Barney and Gentempo et al before him or her, to modify the exercise device of Barney by substituting its temperature sensing means for the infrared temperature sensing means taught by Gentempo et al because non-contact sensors improve the reliability of temperature readings (Gentempo et al, Paragraph 41).

Therefore, it would have been obvious to combine Gentempo et al with Barney to obtain the invention as specified in the instant claims.

12. Claim 10 is rejected under 35 U.S.C. 103(a) as being unpatentable over Barney (US Patent 4,312,358).

Regarding claim 10, Barney discloses all of the limitations of claim 1, but fails to explicitly disclose wherein said temperature is measured at intervals, however, it would have been an obvious matter of design choice to measure the temperature at intervals since applicant has not stated that doing so is for any particular purpose, and furthermore, the device of Barney is capable of measuring the temperature at intervals.

13. Claim 18, *in the alternative*, is rejected under 35 U.S.C. 103(a) as being unpatentable over Ward (US Patent 4,509,531) in view of Huang (US Patent 6,824,502).

Ward discloses all of the limitations of claim 18 as discussed above, however, in case the Applicant disagrees that Ward discloses the product in the form of a control console for training equipment the Examiner is also rejecting claim 18 over Ward in view of Huang.

Huang teaches a control console for training equipment comprising a temperature sensor (Fig 4 and Col 2).

Ward and Huang are analogous art because they are from the same field of endeavor – devices that measure temperature.

At the time of the invention, it would have been obvious to one of ordinary skill in the art, having the teachings of Ward and Huang before him or her, to modify the exercise device of Ward by incorporating it with the control console for training equipment in view of the teachings of Huang because all of the claimed elements are known in the art and it would yield the same predictable result of an exercise device that can detect changes in temperature of a user to provide feedback during physical activity.

Therefore, it would have been obvious to combine Huang with Ward to obtain the invention as specified in the instant claims.

Response to Arguments

14. Applicant's arguments filed 11/14/2008 have been fully considered but they are not persuasive.

Applicant argues that neither Ward nor Barney disclose a temperature processing means and neither are capable of performing the claimed function. The Examiner disagrees. Both Ward and Barney disclose temperature processing means as discussed above, and furthermore, since both devices have control means that allow a user to adjust the settings on the device they are both capable of determining when a user has reached a pre-established condition. E.g., in the Barney device, the user could mentally establish temperature conditions that they do not want to

exceed during use of the device. The display sends visual signals to the user indicating his/her temperature and whenever the pre-established condition is met the user would know via the display. Furthermore, a recitation of the intended use of the claimed invention must result in a structural difference between the claimed invention and the prior art in order to patentably distinguish the claimed invention from the prior art. If the prior art structure is capable of performing the intended use, then it meets the claim.

Conclusion

15. Applicant's amendment necessitated the new ground(s) of rejection presented in this Office action. Accordingly, **THIS ACTION IS MADE FINAL**. See MPEP § 706.07(a). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the date of this final action.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to DANIEL F. ROLAND whose telephone number is (571) 270-5029. The examiner can normally be reached on Monday - Friday (7:30-5:00) Alternate Fridays.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, LoAn Thanh can be reached on (571) 272-4966. The fax phone number for the organization where this application or proceeding is assigned is 571-273-8300.

Information regarding the status of an application may be obtained from the Patent Application Information Retrieval (PAIR) system. Status information for published applications may be obtained from either Private PAIR or Public PAIR. Status information for unpublished applications is available through Private PAIR only. For more information about the PAIR system, see http://pair-direct.uspto.gov. Should you have questions on access to the Private PAIR system, contact the Electronic Business Center (EBC) at 866-217-9197 (toll-free). If you would like assistance from a USPTO Customer Service Representative or access to the automated information system, call 800-786-9199 (IN USA OR CANADA) or 571-272-1000.

/D. F. R./
Examiner, Art Unit 3764

/LoAn H. Thanh/
Supervisory Patent Examiner, Art Unit 3764